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In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1949

No. 449

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 262, SAM NANCE, WILLIAM MORGANSON, CHARLEY MEYER and E. W. HOLBROOK, *Petitioners*,

vs.

W. L. GAZZAM, *Respondent*.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT

ALFRED J. SCHWEPPE,
657 Colman Building,
Seattle 4, Washington.

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304 Medical and Dental Building,
Bremerton, Washington.
Attorneys for Respondent.

THE ARGUS PRESS, SEATTLE

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vs.		
W. L. GAZZAM,	*Respondent.*	

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENT

THE OPINIONS OF THE COURT BELOW

The opinion of the majority of the Supreme Court of the State of Washington on the first appeal reversing the judgment of the trial court (which had granted a motion for nonsuit at the close of the respondent's case and had dismissed the action for damages and injunction) and instructing the trial court to proceed with the trial in accordance with the views expressed in the opinion was entered December 22, 1947, and is reported in 29 Wn.(2d) 488, 188 P.(2d) 97, followed by a concurring opinion, 29 Wn.(2d) 501, 188 P.(2d) 104, and two dissenting opinions, 29 Wn.(2d) 501, 502, 188 P.(2d) 104. Petition for rehearing was denied March 26, 1948, 29 Wn.(2d) 502, 188 P.(2d) 97. These opinions appear at pp. 12-25

of the Record. This decision on the first appeal did not result in a final judgment reviewable here. *Republic Gas Co. v. Oklahoma*, 334 U.S. 62, 68, 68 S. Ct. 972, 92 L. Ed. 1212; *Bruce v. Tobin*, 245 U.S. 18, 19, 38 S. Ct. 7, 62 L. Ed. 123.

The opinion of the Supreme Court of the State of Washington on the second appeal affirming the judgment of the trial court which granted an injunction and awarded damages to the respondent was entered July 1, 1949, and is reported in 134 Wash. Dec. 34, 207 P.(2d) 699. Petition for rehearing was denied August 12, 1949, 134 Wash. Dec. 541, 207 P.(2d) 699. This opinion appears at page 40 of the Record.

STATEMENT OF THE CASE

The respondent, W. L. Gazzam, is an octogenarian (R. 58) who, since June, 1925, has been the sole proprietor of the Enetai Inn, a hotel in Bremerton, Washington (R. 51, 52). The Enetai Inn has 100 rooms in the hotel proper and seven cottages on the waterfront behind the hotel. Both types of accommodations are principally occupied by transients.

In May of 1946, Mr. Gazzam employed about fifteen persons—an engineer, janitor, two bell boys, seven maids, desk clerks, and clerk-housekeeper (R. 52-53). None of these employees was a member of any union (except that Mrs. Stapleton, respondent's desk clerk and housekeeper was or had been a member of a "hotel union" in San Francisco, R. 88). Union men were frequently employed by respondent for construction work, and, in former years when the Enetai Inn maintained a restaurant, union personnel was employed therein. Since the beginning of

the late war, no restaurant has been operated in connection with the hotel (R. 53).

In May of 1946 and at the time of trial, no hotel in Bremerton had been organized by any union (R. 71, 112). Contrary to the statement made on page 13 of Petitioners' Brief, the petitioning union had organized and represented *no* other hotel employees in their collective bargaining dealings with the respective employers. Petitioner Morganson testified "We have no hotel in Bremerton, organized" (R. 112).

Shortly before the first of May, 1946, the petitioners Morganson and Meyer called upon the respondent and asked him to sign a contract with the petitioning union. After stating that union membership was a matter for his employees to decide, the respondent told the petitioners he was going to Los Angeles for a short trip and that in his absence, he "would be delighted to give them the run of the house * * *" (R. 54).

Immediately upon respondent's return from Los Angeles the petitioner Meyer came to see him and said they were waiting for respondent to sign up. In response to respondent's inquiry, petitioner Meyer stated that no applications for union membership had been signed by the employees. As Meyer was leaving, respondent again told him the decision was entirely up to the employees (R. 54).

On May 2, petitioner Morganson prepared and filed with the Bremerton Central Labor Council a complaint against the Enetai Inn. This complaint was in the form of a letter addressed to E. W. Holbrook,

secretary of the Council and was admitted in evidence as defendant's Exhibit No. 3 (R. 97-98). This complaint spoke of the petitioning union's effort to negotiate a contract with respondent. The contract referred to was one which would have required respondent to fire all employees of the Enetai Inn who would not join the petitioning union (R. 98).

On May 2, 1946, respondent received a letter from the Central Labor Council of Bremerton over the signature of petitioner E. W. Holbrook, which letter was quoted in the opinion of the Supreme Court of Washington as follows:

> "This Counsil has been requested by Building Service Employees Local No. 262 to place your hotel on the 'We do not patronize' list.
>
> "Before acceding to a request of this kind, it is the policy of the Council to call a meeting of both parties and attempt to arrange a settlement; accordingly such a meeting has been called for Tuesday, May 7th, at 7:30 P.M. in the office of the Council, upstairs in the old city dock.
>
> "Please be present or have a representative attend, as failure to attend will be construed to mean that you do not wish to bargain collectively with Organized Labor." (Ex. A, R. 13, 55, 157)

In response to this letter, respondent directed his attorney, Mr. Turner (now Judge of the Superior Court of the State of Washington) to represent him at the meeting scheduled for May 7, and Mr. Turner did so. Respondent did not attend in person.

Replying to questions propounded by respondent's attorney, Mr. Turner, petitioner Morganson described

the discussion which took place at this May 7th meeting in part as follows:

"Q. You stated in your statement that you had attempted to organize the Enetai Inn and get Mr. Gazzam to sign this contract and he had refused?

A. Correct.

Q. Then I was called upon to make a statement and I asked you whether it was not the fact that you had been given full opportunity to persuade the employees to join the union and you admitted you had?

A. I did not deny it.

Q. You admitted you were told you could see the employees? You did see the employees and you had no evidence that Mr. Gazzam had hindered you? I believe that was the form of your admission?

A. Yes.

Q. And that you had obtained no signatures from the employees of the hotel, asking for admission to membership into the union?

A. Yes.

Q. And I took the position that so far as wages were concerned, they were not in issue at that time because the union did not represent any of Mr. Gazzam's employees, and so far as the employees, themselves, were concerned, they were satisfied with their present terms of employment?

A. Our position was on the wages and hours. That was our position. And that is why we were interested in organizing the place.

Q. From then on, the rest of the debate was confined to whether or not Mr. Gazzam should be compelled to sign or should not be compelled to

sign a contract which would have the effect of making his employees choose whether they would join the union or be discharged?

A. At that date, yes.

Q. And I took the position that that would be coercion, under the state law, and that the employer should not be asked to coerce his employees? That is the position I took at that meeting?

A. Yes." (R. 99-100)

At the suggestion of the president of the Central Labor Council the parties agreed that representatives of the petitioning union should meet with respondent's employees at the Enetai Inn on May 10th, and talk to them altogether. It was also agreed that respondent would not be expected to attend that meeting and tell the employees he intended to sign up (R. 100).

Around 2:00 p.m., in the afternoon of May 10, the meeting at the Enetai Inn got under way (R. 101). Eleven of respondent's employees were present (R. 85), as were six representatives of the petitioning union and the Central Labor Council, and Mr. Turner (R. 101).

Mr. Turner opened the meeting by stating that the purpose of the meeting was to make it possible for representatives of the union to address the employees in a body, and that respondent was expressing no opinion one way or the other (R. 101). He introduced the union representatives to the employees (R. 84) and then Mr. Norman, president of the Central Labor Council took over and presided as long as the non-employees were present (R. 101).

On pages 13 and 31 of their brief the petitioners state that this meeting was held under the chairmanship of the hotel's manager. The statement is not accurate. From the record it appears that there was no permanent chairman. The meeting was opened by Mr. Turner who stated the object and introduced the petitioner's representatives; then the president of the Central Labor Council took the chair (R. 101). Respondent, the sole manager of the hotel, was not present (R. 90, 84).

Following Mr. Norman's assumption of the chair, petitioners Meyer, Holbrook (R. 101-102) and Morganson (R. 84) addressed the employees and explained to them the advantages of union membership (R. 84, 101, 102). Questions were invited, but none were asked (R. 85, 102). No one at the meeting spoke against the union (R. 85).

At the conclusion of the speeches by petitioners, when no questions were forthcoming, Mr. Turner and the representatives of the union and the Central Labor Council withdrew, leaving the employees alone to vote (R. 85, 102). Mrs. Stapleton, employed by respondent as desk clerk and housekeeper, and the only one of respondent's employees who was a member of organized labor, was chosen to preside (R. 70, 78, 88, 85). Mrs. Stapleton described the voting and the result as follows:

> "* * * Then they all went upstairs and I was sort of elected for chairman or speaker,—speaker in charge. And I asked anyone who wanted to join the union to raise his hand. One raised his hand,—a bell boy and janitor. One of the maids

didn't know whether she did or not. She wanted to talk it over with her husband. I went upstairs,—

"I asked for anyone who did not want to join to hold up his hand. They all held up their hands that they didn't—except these two. And I think there was eleven of us present. One said he wanted to join. One was undecided. And the rest said, 'No.' I went upstairs and reported the way it happened to you and the other gentlemen and resumed by duties as usual. * * *" (R. 85)

Mrs. Stapleton herself cast no vote. The only vote cast in favor of union membership was cast by a bell-boy, and apparently the petitioners did not desire his membership. On cross-examination petitioners' counsel interrogated Mrs. Stapleton as follows:

"Q. You indicated that the bell boy or bell boys voted.

A. Yes.

Q. Did you know that the defendant union had no desire to include that work under their contract?

A. No, I didn't but they talked to them.

Q. Did you know that all the union desired to have included in their contract, so that they could be the subject of collective bargaining, would be just the jobs of the maids?

A. It was my impression that they wanted the bell boys, too, because the bell boys were assisting the janitor. You mean to say you only wanted the maids and not the janitor?

Q. You didn't know about that?" (R. 92)

The record does not show that the bell-boy was ever admitted to membership.

Without further negotiations (R. 102) on May 29th, the respondent received a letter from the Central Labor Council over the signature of E. W. Holbrook which read as follows:

> "By action of the Central Labor Council, in regular meeting, Monday, May 27th, your hotel, the Enetai Inn, was placed on the 'We do not patronize' list." (Ex. B, R. 13, 56)

On May 29 or 31, 1946, the petitioning union began to picket respondent's hotel (R. 103, 57, 78). The picketing consisted of a single picket, carrying a sandwich sign, patrolling in front of the hotel. The sign bore the legend in front and back: "Enetai Inn —unfair to organized labor," and the signature of the petitioning union (R. 57). The picketing was entirely peaceful.

On June 1st, a labor conciliator from the State Department of Labor and Industries called a meeting of the parties which was attended by petitioners Holbrook, Morganson, Meyer and Mr. John C. Merkel, then attorney for the petitioning union, all representing the petitioning union, and by respondent's attorney. The parties maintained their respective positions substantially the same as at the hearing before the Central Labor Council on May 7th, the petitioners still insisting on a contract which would force the employees into the union (R. 106, 166). It was then agreed that respondent's attorney would again consult respondent to see whether he would consider signing a contract, and would advise Mr. Merkel of respondent's answer within five days, and that in the

meantime petitioners would withdraw the pickets (R. 107).

The pickets were then withdrawn (R. 105).

In accordance with this arrangement, respondent's attorney, Mr. Turner, wrote to petitioners' then attorney, Mr. Merkel, as follows:

"Mr. John C. Merkel
Attorney-at-Law
Harrison Building
Bremerton, Washington

June 4, 1946

"Dear Sir:

"Mr. Gazzam has authorized me to say that we are willing to continue negotiations with the representatives of Building Service Employees Local No. 262 for the purpose of reaching some satisfactory solution to the present controversy other than entering into a contract of the type which Mr. Meyers and yourself have thus far proposed. Mr. Gazzam is unwilling to negotiate with the Union concerning such a contract for the reason that this type of contract, as you, Mr. Meyers, and Mr. Morganson have all explained it, would force all the employees of the Enetai Inn to choose between joining the Union and being discharged, and these employees have already expressed their wish not to join this Union.

"If you have any other type of contract which would not force such a result, we will be glad to include such other form of contract in our negotiations looking to a satisfactory solution.

Cordially yours,

(Signed) THEODORE S. TURNER."

(Ex. E, R. 107)

The only reply to this letter was the prompt replacement of the pickets (R. 107-108, 167).

About June 22, 1946, the petitioners submitted a new proposal to respondent which provided:

> "It is agreed by both parties hereto that the regular employees now working at the hotel shall not as a condition of continued employment be required to become members of the union. It is further agreed that any new employees who are hired to replace regular employees who have left through normal turnover or discharge shall as a condition of employment become members of the union. New employees shall be required to become members of the union within fifteen days after employment. It is understood that the employer shall have the voluntary right to either call the union for new employees or hire anyone whom he desires the only factor being that a condition of employment of new employees shall be that they come into the union within fifteen days. *It is also agreed that the union shall be the bargaining agent for both Union and non-union employees and that any wages hours and working conditions established for Union employees shall be paid also to non-union employees.*" (Ex. I, R. 14-15, 74, 110) (Emphasis supplied)

The picketing continued until July 20, 1946 (R. 67).

This action for an injunction and damages was begun June 29, 1946 (R. 1), the respondent alleging that petitioners were endeavoring to force him wrongfully and unlawfully to coerce his employees to join the petitioning union (R. 2-3).

The Enetai Inn remained on the "unfair list" until the time of the trial, October 22, 1946 (R. 43, 108).

At the conclusion of the second trial, the court entered a decree, the pertinent portion of which reads as follows:

"NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS, to wit:

"1. That the plaintiff do have and recover judgment against the defendants, and each of them, for damages for the wrongful picketing alleged in plaintiff's complaint in the sum of Five Hundred Dollars ($500.00) together with his costs and disbursements herein to be taxed, except as to defendant Holbrook, who is hereby dismissed;

"2. The defendants, and each of them, are hereby restrained and enjoined from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining, by picketing the hotel premises of plaintiff, *viz.*, the Enetai Inn, Bremerton, Washington, by boycotting plaintiff or the said Enetai Inn in any manner whatsoever, whether directly or indirectly, and by urging and persuading others to withhold their patronage from the plaintiff and said Enetai Inn or to refuse to contract, deal with or make deliveries to plaintiff or to said Enetai Inn.

"DONE IN OPEN COURT this 20 day of September, 1948.

H. G. SUTTON, Judge." (R. 39)

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

To approach this case with the candor to which it is entitled, respondent hastens to answer "The Questions Presented," itemized on page 8 of the petition for certiorari. Obviously, each of the four questions there propounded must be answered in the negative. However, negative answers to each of the four questions fail to dispose of this case or even touch upon the only issue, to-wit: Does the following injunction deprive petitioners of any rights guaranteed them by the First and Fourteenth Amendments to the Constitution of the United States?

> "2. The defendants, and each of them, are hereby restrained and *enjoined from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining*, by picketing the hotel premises of plaintiff, *viz.*, the Enetai Inn, Bremerton, Washington, by boycotting plaintiff or the said Enetai Inn in any manner whatsoever, either directly or indirectly, and by urging and persuading others to withhold their patronage from the plaintiff and said Enetai Inn or to refuse to contract, deal with or make deliveries to plaintiff or to said Enetai Inn." (Emphasis supplied)

The two subsidiary questions are:

1. Is it unlawful in the State of Washington for an employer to coerce his employees into joining or not joining a particular labor organization?
2. Is picketing for the purpose of compelling an employer to coerce his employees into joining or not joining a particular labor organization a proper exercise of the right of free speech?

SUMMARY OF ARGUMENT

The order under review (R. 39) entered below after the first appeal and affirmed by the Supreme Court of Washington on the second appeal (R. 40, 41) was narrowly and precisely drawn so as to enjoin the petitioners only from pursuing an unlawful object, namely, compelling respondent to coerce his employees with reference to union affiliation and representation, in violation of state law. The state law specifically provides that an employee shall be free from interference, restraint, or coercion by his employer, in the designation of bargaining representatives. Such coercion of his employees by an employer is illegal, not only in the State of Washington but in most other states of the Union, and is also contrary to federal law.

Picketing for the purpose of compelling an employer or anyone else to do an unlawful act is not a lawful exercise of the right of free speech and may be enjoined. *Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 649. This point is so clearly disposed of by the unanimous decision of this court in the case just cited as hardly to leave a substantial federal question, *Equitable Life Ass. Co. v. Brown*, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk etc. R. Co.*, 228 U.S. 596, 600, 33 S. Ct. 605, 57 L. Ed. 982; *Honeyman v. Hanan*, 300 U.S. 14, 23, 57 S. Ct. 350, 81 L. Ed. 476.

ARGUMENT

I.

It is unlawful in the State of Washington for an employer to interfere with, restrain or coerce his employees with reference to union affiliation or choice of bargaining representatives.

Section 2 of Chapter 7 of the Laws of Washington, 1933, Extraordinary Session (Rem. Rev. Stat., 1940 Supp. §7612-2) provides in part:

> "* * * the public policy of the State of Washington is hereby declared as follows:
>
> "Whereas, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, *though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor,* or their agents, *in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;* * * *." (Emphasis supplied)

Although no contention has been made that respondent or his employees were engaged in interstate

commerce, and no application has been made to a lower federal court for relief by either party, it is of interest to note that the wording of the above-quoted Washington statute is identical with wording of the Norris-LaGuardia Act, 47 Stat. 70, Title 29 U.S.C. 102.

Three years after the passage of the Norris-LaGuardia Act, Congress passed the Wagner Act, which made it an unfair labor practice for an employer:

> "(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."
>
> "(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, *if such labor organization is the representative of the employees as provided in section* 159(a) *of this title*, in the appropriate collective bargaining unit covered by such agreement when made." (29 U.S.C.A. §158. Emphasis supplied)

The rights of employees protected by section 157 are:

> "* * * Employees shall have the right to self-organization, to form, join, or assist labor organ-

izations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C.A. §157)

Section 159 (a) provides:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *" (29 U.S.C.A. §159(a))

Thus the policy of the State of Washington was and is in complete harmony with national policy, although Washington has never enacted a Labor Relations Act.

Interpreting the above-quoted sections of the Wagner Act, the Circuit Court of Appeals for the Second Circuit held in *National Labor Relations Board v. National Casket Co.* (1939) 107 F.2d 992:

"* * * As we read the section it means that an employer may not require an applicant for work, as a condition to accepting him for employment, to join or to resign from a union, nor insert in the contract of employment any other discriminatory term that encourages or discourages membership in a labor organization, excepting only that, if the facts stated in the proviso exist, the employer may require membership in the labor organization which has been legally chosen to represent his employees. * * *" (p. 997)

Again, the Court of Appeals for the Seventh Circuit stated in *National Labor Relations Board v. William Davies Co.* (1943) 135 F.2d 179, Cert. den. 320 U.S. 770, 64 S. Ct. 82, 88 L. Ed. 460, at page 181:

> "* * * It seems to be necessary to emphasize again that the question of organization by the employees for the purpose of collective bagaining is the exclusive business and concern of the employees. It is the mandate of the statute that the employer shall not intrude himself into the picture. The slightest interference, intimidation or coercion by the employer of the employees in the rights guaranteed to the employees by the statute constitutes an unfair labor practice in violation of Section 8(1) of the Act. ***"

The Washington statute above quoted provides that the employees "shall be free from interference, restraint, or coercion of employers of labor" (Rem. Rev. Stat., 1940 Supp., §7612-2) in the designations of their representatives. In the instant case the petitioners were trying to force the respondent, first, to agree that those of his employees who would not join the petitioning union be discharged (R. 98) and later, to agree that any new employees should join the petitioning union as a condition of continuing employment, and to recognize the petitioning union as the bargaining agent for *all* of his employees (R. 14) although intensive solicitation had resulted in no applications for union membership (R. 54) and the employees had voted overwhelmingly against union affiliation (R. 85).

The Supreme Court of Washington has held picketing for the purpose of compelling an employer to coerce his employees with reference to union affilia-

tion unlawful not only in the instant case, but in *Safeway Stores v. Retail Clerks' Union, Local No.* 148 (1935) 184 Wash. 322, 51 P.(2d) 372. In the latter case the majority of the court asked this salient question:

> "* * * What right have the respondents to insist or demand, at the threat or cost of the destruction of appellant's business, or at all, that appellant ask, urge or coerce, directly or indirectly, its employees, who are at liberty to do as they please, to join respondents' organization? * * *." (p. 338)

That the answer to this question is that no such right exists is amply demonstrated not only by the decisions of the Supreme Court of Washington interpreting Washington law, but also by the decisions of the highest courts of other states interpreting the statute or common law of their respective jurisdictions.

Michigan has no statute analogous to the Norris-LaGuardia Act. Yet the Supreme Court of Michigan held in *Silkworth et al. v. Local* 575 *of A. F. of L.* (1944) 309 Mich. 746, 16 N.W.(2d) 145:

> "Therefore, in the present case we must determine whether or not defendants' picketing of plaintiffs' storage plant was for the purpose of obtaining a lawful labor objective. The motive for the picketing, that is, the result sought to be accomplished, was a question of fact. The testimony is convincing that defendants' real objective was to compel plaintiffs to put their drivers in defendant union by paying their initiation fees, regardless of whether or not the drivers wished to join. *This was not a lawful labor objective.* Defendants could not use the lawful means of

peaceful picketing to accomplish such unlawful purpose.

"To hold with defendants' contention, under the facts and circumstances shown by the record, would provide a way whereby employers could be coercively compelled to pay union initiation fees for their employees, regardless of whether or not the employees wished to join the union. Such a course would not be in the furtherance of legitimate union aims and activities, nor would it be for the best interests of unions or employees.

"We confine our holding in the present case to the point that defendants could not use the lawful means of peaceful picketing to accomplish their unlawful objective. However, our decision should not be construed as in any way limiting or restraining peaceful picketing in the accomplishment of a lawful labor objective." (p. 150) (Emphasis supplied)

The Supreme Court of Indiana, in *Roth v. Local Union No.* 1460 *of Retail Clerks Union* (1939) 216 Ind. 363, 24 N.E.(2d) 280, discussed the effect of a state statute identical with Rem. Rev. Stat. 1940 Supp. §7612-2, quoted above. Before proceeding with the pertinent quotations from this important case, it is necessary to correct a misstatement occurring on page 28 of petitioners' brief. On page 28 of their brief, petitioners refer to the *Roth* case as one which "without even mentioning the right of freedom of speech, held picketing coercive if there was no direct employer-employee relationship involved." As a matter of fact, the first question discussed by the court, after stating the facts, was the question of freedom of speech. The Indiana court said:

"Prior to the enactment of any statute upon the subject in this state, this court recognized, under the principles of the common law, the right to picket in controversies between an employer and his employees, where there was no resort to force, threats, intimidation or other unlawful means. *Karges Furniture Co. v. Amalgamated, etc., Union*, 1905, 165 Ind. 421, 75 N.E. 877, 2 L.R.A., N.S. 788, 6 Ann. Cas. 829. This right, when lawfully used, has been declared to be a proper exercise of free speech and peaceable assemblage and the right to use the public streets and highways * * *." (p. 282)

The Indiana court stated the facts to be the following:

"The facts are not here in dispute. The court found from the evidence (which is not before us) that the plaintiff had performed all obligations imposed upon him by law; that he was at peace with his employees; that none of them belonged or wanted to belong to the picketing union; *and that the object of the picketing complained of was to compel the plaintiff, against his desire, to sign a closed shop contract, whereby his employees would be compelled to join the union against their will or be discharged, which, as we have already pointed out, the plaintiff was prohibited from doing by p sitive law.* Under these circumstances, the picketing was wrongful and oppressive and it ought to have been enjoined." (p. 283) (Emphasis supplied)

Interpreting the Indiana statute which is identical with Rem. Rev. Stat. 1940 Supp. §7612-2, the court said:

"To ascertain the intent of the legislative body that enacted a statute is the fundamental rule

for its judicial construction. When the purpose of an act is expressed in clear and unambiguous terms, this must be accepted as the solemn declaration of the sovereign. The public policy of the state is a matter for the determination of the Legislature and not for the courts. The statute here under consideration declares that it is the public policy of this state that the individual unorganized worker shall be free to decline to associate with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean that no labor union may demand that an employer require his employee to join such union, because no employer has the right to require an employee to join or refrain from joining a labor union. *Any person or group which undertakes to coerce an employer to do that which is contrary to the express public policy of this state thereby undertakes to compel the performance of an unlawful act.* The lawful weapon of peaceful picketing may not be utilized to accomplish such an unlawful purpose. It is quite immaterial that the things done to bring about the unlawful purpose were not per se unlawful. This is our interpretation of our statute." (pp. 282-283) (Emphasis supplied)

After quoting the above language and more from the *Roth* case, the Supreme Court of Washington in the instant case said:

"Our act and that of Indiana are identical; the facts in each case are alike. The reasoning and conclusions of the supreme court of Indiana are unanswerable. We adopt them as quoted above.

"We hold that the acts of respondents, in so far as the picketing was concerned, were coercive

—first, because they violated the provisions of Rem. Rev. Stat. (Supp.) §7612-2, and, second, because they were in violation of the rules of common law as announced in the cases just approved." *Gazzam v. Building Service Etc.*, 29 Wn. (2d) 488, at p. 500 (R. 23-24)

Petitioners seek to becloud the issues in this case by implying that all peaceful picketing in the absence of an employer-employee relationship or for the purpose of unionizing a non-union place of business was enjoined by the Washington court. To set the matter straight, respondent wishes to point out that he has never contended and does not now contend that picketing in the absence of an employer-employee relationship is unlawful *per se*, nor does he contend that picketing for the purpose of unionization is necessarily subject to injunction. *The only injunction sought or granted in this case was against trying to compel respondent to coerce his employees* (R. 9, 39).

The distinction between picketing to compel the employer to coerce his employees into joining a union, and picketing for unionization was recognized by the Supreme Court of Oregon in *Peters v. Central Labor Council* (1946) 179 Ore. I, 169 P.(2d) 870, where the Oregon court observed at page 875:

"We have said that under the facts of this case *it would be unlawful to picket for the purpose of coercing plaintiffs to sign the 'closed shop' agreement.* It does not follow, however, that the union could not picket for the unionization of the plant even though none of its members were employees therein, as that is, according to the overwhelming weight of authority, a legal labor objective * * *." (Emphasis supplied)

The Oregon court pointed out that for the employer to sign a closed shop agreement with a union to which a majority of his employees did not belong or wish to join would constitute an unfair labor practice, and picketing to induce that result was held unlawful.

A similar result was reached in *Park & Tilford Imp. Corp. v. International Broth., Etc.* (1946) 27 Cal. (2d) 599, 165 P.(2d) 891. The Supreme Court of California held:

> "Since defendants, in connection with their concerted activities, made unlawful demands that plaintiff sign a closed shop contract and coerce its employees to join defendant unions, it was permissible for the trial court to enjoin defendants from making such demands. The judgment is therefore modified by limiting the injunction to the enjoining of defendants from making demands in connection with their concerted activities that plaintiff sign a closed shop contract with defendants or coerce its employees to join defendant unions so long as they do not represent the requisite majority of plaintiff's employees * * *." (p. 900)

It will be noted that in the case at bar the injunction runs against nothing but the effort of the union to compel the respondent to coerce his employees.

Commenting on the *Park & Tilford* case, the note writer in 59 Harv. L. Rev. 1123 concludes at pages 1127-1128:

> "Although other courts have not been so scrupulous in separating the lawful from the unlawful, the conclusion seems warranted that outside-union action directed at employees is not likely to be enjoined, *whereas an injunction will usually be*

granted if the union seeks to reach the employees through pressure on the employer. This may seem inconsistent with the cases in the rival-union situation which have upheld action directed at a union through the employer in the absence of certification. Applying the balance-of-interests theory, the distinction seems sound. Where the employees are themselves members of a union, their ability to protect their own interests is considerably greater that when they act as individuals, and there is consequently less public interest in preventing persuasion from becoming coercion through enforced pressure from the employer. However, where possible, the action directed at the employer should be severed from that directed at the employees and the solution of the *Park & Tilford* case adopted." (Emphasis supplied)

A recent case dealing with a set of facts closely analogous with the facts in the instant case is *Wilbank v. Chester & Delaware Counties B.H. & R.E.U.* (1948) 360 Pa. 48, 60 A.(2d) 21, in which the union picketed a hotel. The facts are stated in the opinion:

"The plaintiffs conduct a hotel, restaurant and tap room with fourteen employees. There was no controversy between plaintiffs and their employes. A majority of them were not members of a labor union and did not wish to become members. The plaintiffs had no objection to any of their employes joining any union and offered no objection to defendants' effort to persuade them to join a union. Defendant union did not represent any of plaintiffs' employes. In April or May, 1947, the defendant, Roco Locantore, the defendant union's business agent, submitted to plaintiffs for execution a form of contract to

> govern plaintiffs' relations with their employes and requiring plaintiffs to employ only union employes; Locantore informed plaintiffs that if they did not execute the contract picketing would result. Plaintiffs, desiring not to coerce their employes declined to comply with Locantore's request and the picketing followed as threatened. * * *." (p. 22)

Although the picketing appears to have been attended with some disorder, the court did not mention such disorders in affirming an injunction. Pennsylvania had a statute making it an unfair labor practice for an employer to interfere with, restrain or coerce employes in the exercise of the rights guaranteed by the Labor Relations Act. (The Washington statute provides that an employee shall "be free from interference, restraint, or coercion of employers of labor" in the designation of his representatives for collective bargaining, Rem. Rev. Stat., 1940 Supp. §7612-2). The Supreme Court of Pennsylvania held:

> "Defendants' purpose in picketing was to require plaintiffs to force their employes to join the union or to discharge them and employ others who are members of the union. Such a purpose is clearly unlawful and subject to restraint * * *." (p. 23)

This court denied certiorari, 336 U.S. 945, 69 S. Ct. 812, 93 L. ed. 713.

Petitioners argue that when the second form of contract quoted herein at page 11 was presented to respondent, any effort to compel the respondent to coerce his employees was abandoned (Brief of Petitioners, p. 34). The picketing of respondent's place of

business began either May 29th or 31st, 1946 (R. 57, 78, 103). The petitioners were still insisting that respondent sign a contract which would force his employees, willy-nilly, into union membership (R. 106, 166). On June 22, 1946, the petitioners tendered the form of contract which they assert removed all taint of illegality (R. 74, 110). The last sentence of the new proposed clause read as follows:

> "* * * *It is also agreed that the union shall be the bargaining agent for both Union and non-union employees and that any wages hours and working conditions established for Union employees shall be paid also to the non-union employees.*" (R. 14-15)

The employees were still not to be free to select their own representatives as provided in Rem. Rev. Stat. 1940 Supp. §7612-2. The respondent was still expected to force them into union representation. The picketing continued until July 20, 1946 (R. 67).

The Restatement of Torts, §794 and §796, succinctly summarizes respondent's contention on this point:

> "§794. OBJECT PROHIBITED BY LAW.
>
> "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."
>
> "§796. COMBINATION OF OBJECTS.
>
> "When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees.' * * *.

"'* * * On its face the permanent injunction in that decree rested on the explicit avowal that 'peaceful persuasion' was forbidden in this case because those who were enjoined were not in Swing's employ * * *.'" (p. 324)

This court went on to hold:

"'* * * it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review * * *.

"'* * * We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. * * *." (p. 325)

In the instant case also, "it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review."

Let us again look at this decree. The enjoining portion provides:

"2. The defendants, and each of them, are hereby restrained and *enjoined from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining*, by picketing the hotel premises of plain-

> tiff, *viz.*, the Enetai Inn, Bremerton, Washington, by boycotting plaintiff or the said Enetai Inn in any manner, whatsoever, whether directly or indirectly, and by urging and persuading others to withhold their patronage from the plaintiff and said Enetai Inn or to refuse to contract, deal with or make deliveries to plaintiff or to said Enetai Inn." (R. 39) (Emphasis supplied)

Thus the furtherance of an unlawful objective is the only thing enjoined, and peaceful picketing for any lawful objective is not hampered by the decree. The absence of an employer-employee relationship is not even mentioned. In the case at bar an employer-employee relationship is immaterial to the issues.

For example, suppose the picketing had all been done by the single one of respondent's employees who voted for union affiliation. If the object of the picketing remained the same, namely to compel respondent to coerce his employees into joining the petitioning union or recognizing it as their bargaining agent against their expressed wishes, the picketing would still be for an unlawful objective and enjoinable.

Thus *A.F. of L. v. Swing* (1941) 312 U.S. 321, 61 S. Ct. 568, 85 L. ed. 855, furnishes no precedent in the instant case, where it is not picketing *per se* that has been enjoined, but solely the furtherance of an unlawful objective by any means whatever.

Petitioners place considerable reliance also on the case of *Bakery Drivers Local v. Wohl* (1942) 315 U.S. 769, 62 S. Ct. 816, 86 L. ed. 1178, in which a union picketed two bakery peddlers to compel them to employ a relief man one day a week and pay him union wages.

"It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill v. Alabama*, 310 U.S. 88, 102, and *Allen Bradley Co. v. Union*, 325 U.S. 797, 807, note 12. But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at the peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. * * *." (pp. 497-498)

"* * * No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society.

"We think the circumstances here and the

II.

Picketing to compel an employer to do an unlawful act is not within the protection of the First Amendment and Fourteenth Amendment of the Constitution of the United States.

This court stated in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 41 S. Ct. 352, 65 L. ed. 704:

> "* * * Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who counsels and encourages the violation of the law as it exists." (p. 414)

In *Senn v. Tile Layers Union* (1937) 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229, this court upheld the constitutionality of the certain provisions of the Wisconsin Labor Code which authorized peaceful picketing and held that picketing to induce an employer to agree to refrain from engaging in manual labor was picketing for a lawful objective. After pointing out that freedom of speech is guaranteed by the Federal Constitution (p. 478), this court observed at page 480:

> "There was no effort to induce Senn to do an unlawful thing."

The cases of *Carlson v. California* (1940) 310 U.S. 106, 60 S. Ct. 746, 84 L. ed. 1104, and *Thornhill v. Alabama* (1940) 310 U.S. 88, 60 S. Ct. 736, 84 L. ed. 1093, held sweeping legislative enactments banning, in effect, all picketing, to be unconstitutional. Respondent has no quarrel with these decisions, which are in no way in point in this case.

As we understand it, petitioners place their princi-

pal reliance upon *A.F. of L. v. Swing* (1941) 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855. This case held that a decree in equity prohibiting all peaceful picketing in the absence of an employer-employee relationship deprived the picketing union of the guarantee of freedom of speech. Obviously, this decision furnishes no guidance in the case at bar. There was in that case no union activity to coerce the employer to violate a state statute. Moreover, where, as in the case at bar, the employer Gazzam was a completely innocent and neutral bystander, as the state court found, and as the state and federal law required him to be, a state court injunction to prevent damage to the business of this law-abiding, innocent and neutral bystander, cannot be deemed a violation of any union right protected by the federal constitution. While the foregoing observation is not necessary from our point of view to uphold the specific and narrow state court order under attack here, we make it because of petitioner's emphasis on the *Swing* case, which we do not deem in point for the reasons stated.

In the *Swing* case, the Illinois court entered a decree described by this court as follows:

> "* * * Thereupon, although as we have seen issue had been formally joined on the claims of libel and violence, the appellate court, by a procedure unrevealed by the record and without opinion, entered a permanent injunction ranging from peaceful persuasion to acts of violence. The decree recited 'that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (*i.e.*, where there is not

While the lower courts made no findings as to whether this object was lawful or unlawful, there does not appear to be anything illegal about hiring a relief man or paying him union wages. In fact, the *Wohl* case seems closely analogous to *Senn v. Tile Layers Protective Union* (1937) 301 U.S. 468, 57 S. Ct. 857, 81 L. ed. 1229, although the *Senn* case is not mentioned in the opinion. The lower courts held that there was no labor dispute and for this reason granted an injunction. This court held that the absence of a labor dispute did not warrant an injunction against free communication. The court, at page 775, did point out:

> "* * *. A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual * * *."

and this court has consistently held that a state is not required to tolerate picketing which is attended by violence, *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U.S. 287, 61 S. Ct. 552, 85 L. ed. 836, 132 A.L.R. 1200, or is in furtherance of an unlawful objective, *Carpenters Union v. Ritter's Cafe* (1942) 315 U.S. 722, 62 S. Ct. 807, 86 L. ed. 1143, *Giboney v. Empire Storage & Ice Co.* (1949) 336 U.S. 490, 69 S. Ct. 684, 93 L. ed. 649.

Respondent submits that the last cited case is controlling in the case at bar. In the *Gibony* case the union picketed for the purpose of compelling the company to agree to stop selling ice to non-union peddlers. Such an agreement was illegal under Missouri law. The Missouri court granted an injunction which this court affirmed. The argument advanced by the union in that case was the same as is advanced in the case at bar. This court unanimously said:

reasons advanced by the Missouri courts justify restraint of the picketing which was done in violation of Missouri's valid law for the sole immediate purpose of continuing a violation of law. In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges v. California*, 314 U.S. 252, 263. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider v. State*, 308 U.S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. *Virginia Electric Co. v. Board*, 319 U.S. 533, 539; *Thomas v. Collins*, 323 U.S. 516, 536, 537, 538, 539-540. Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. *Thomas v. Collins*, supra, at 547. For the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to mak a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. See *e.g.*, *Fox v. Washington*, 236 U.S. 273, 277; *Chaplinsky v. New Hampshire*, 315 U.S. 568. Such an expansive interpre-

> tation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." (pp. 501-502)

Likewise the United States Court of Appeals for the Tenth Circuit held in *United Brotherhood of Carpenters v. Sperry* (1948) 170 F.(2d) 863, that the use of "we do not patronize" lists, is not protected by constitutional guarantees of freedom of speech and press when such lists are used for an unlawful purpose.

The state courts have held that injunctions against picketing for an unlawful purpose do not deprive the picketing unions of freedom of speech. In *R. H. White Co. v. Murphy* (1942) 310 Mass. 510, 38 N.E.(2d) 685, the Supreme Judicial Court of Massachusetts said:

> "The defendants have relied largely upon *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.ed. 1093, *Carlson v. California*, 310 U.S. 106, 60 S.Ct. 746, 84 L.ed. 1104, and *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.ed. 855, in support of their contention that peaceful picketing though for an unlawful purpose is not itself unlawful, and may not be enjoined. We do not adopt this view, being of opinion that there is nothing in those cases to support the proposition that freedom of speech includes the right, by picketing, to persuade or induce an employer to violate the statute by engaging in an unfair labor practice, and thus to set at naught the declared public policy of

the Commonwealth, the foundation of the statute itself. In none of these cases just referred to was the picketing carried on for an unlawful purpose. * * * We are of opinion that none of the cases relied upon by the defendants, which we have already discussed, is authority for any principle that picketing by workmen in concert to persuade or induce an employer to do an unlawful act, one condemned by statute as an unfair labor practice and contrary to the defined public policy of the Commonwealth and of the nation, is permissible under the constitutional guaranty of freedom of speech, or otherwise. * * *." (pp. 690-691)

"* * * We are of opinion that the constitutional guaranty of freedom of speech does not include a right by workmen to picket the premises of an employer to persuade or induce action by him and that would be in violation of a defined public policy of the Commonwealth, a public policy the same as that defined in the National labor relations act, which has been given judicial recognition as a constitutional measure in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.ed. 893, 108 A.L.R. 1352. here is no conflict between the public policy of this Commonwealth as defined in our labor relations acts and that defined by the United States as determined by Congress in the National labor relations act. In each the public policy defined is the same.

"It follows from what has been said that the picketing in the present case was for an unlawful purpose. There was therefore no error in the order for final decree made by the judge * * *." (p. 692)

CONCLUSION

The record in this case demonstrates that the purpose of the picketing by petitioners was to force respondent to coerce his employees with reference to union affiliation and designation of bargaining representatives. Such coercion by an employer is contrary to law in the State of Washington. Picketing to compel an employer to do an unlawful act is illegal and may be enjoined. The Washington court enjoined only the furtherance of the unlawful objective and no more. Picketing to compel an employer to do an unlawful act is not protected by the Constitutional guarantees of freedom of speech. The decree of the Supreme Court of Washington should be affirmed.

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